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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 21

JOHN F. TINKER and MARY BETH TINKER, minors, by their father and next friend, LEONARD TINKER and CHRISTOPHER ECKHARDT, minor, by his father and next friend, WILLIAM ECKHARDT,

Petitioners,

—v.—

THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, THE BOARD OF DIRECTORS OF THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, ORA E. NIFFENEGGER, MRS. MARY GREFE, ARTHUR DAVIS, L. ROBERT KECK, GEORGE CAUDILL, JOHN R. HAYDON, MERLE F. SCHLAMPP, DWIGHT DAVIS, ELMER BETZ, GERALD JACKSON, MELVIN BOWEN, DONALD WETTER, CHESTER PRATT, CHARLES ROWLEY, RAYMOND PETERSON, RICHARD MOBERLY, VERA TARMANN, LEO WILLADSEN, DONALD BLACKMAN, VELMA CROSS and ELLSWORTH E. LORY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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—v.—

DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on November 3, 1967.

Citations to Opinions Below

The opinion of the Court of Appeals, per curiam, sustaining the judgment of the District Court is printed in the Appendix, *infra*, pp. 1a-2a, and is reported at 383 F. 2d 988. The District Court opinion is printed in the Appendix, *infra*, pp. 4a-8a, and is reported at 258 F. Supp. 971.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was entered November 3, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Whether the First and Fourteenth Amendments permit officials of state supported public schools to prohibit students from wearing symbols of political views within school premises where the symbols are not disruptive of school discipline or decorum.

Statute Involved

Section 282.4, Code of Iowa, 1966:

> "Majority vote—Suspension. The board (of directors of a public school corporation) may, by a majority vote, expel any scholar from school for immorality, or for a violation of the regulations or rules established by the board, or when the presence of the scholar is detrimental to the best interests of the school; and it may confer upon any teacher, principal or superintendent the power temporarily to dismiss a scholar, notice of such dismissal being at once given in writing to the president of the board."

Statement of the Case

In December, 1965, the minor petitioners, pupils of respondent school district, decided to wear bands of black cloth on the sleeves of their clothing to demonstrate support for a proposed indefinite truce in the Vietnam war and to demonstrate that they mourn the deaths of those killed in that war (R. 11). The pupils are active in Quaker and Unitarian religious organizations (R. 11, 12, 21, 26).

Upon learning of this plan, the respondents, who are high school administrators, met and decided that wearing of arm bands by pupils in school would be prohibited, and that those who violated the prohibition would be suspended (R. 35).

The minor petitioners wore arm bands to school and were suspended, but were allowed to return without the arm bands (R. 12, 15, 21, 23, 24, 26, 28). The record affirmatively establishes that the arm bands neither disrupted nor threatened to disrupt decorum or discipline within the schools (R. 13-15, 18-19, 21-24, 26-29, 39).

The pupils and their parents petitioned the District Court for damages and injunctive relief under 42 U. S. C. 1983 (R. 1, 7). After hearing, the petition was dismissed (R. 45). The District Court agreed with petitioners that the circumstances were the same as in *Burnside* v. *Byars,* 363 F. 2d 744 (5th Cir. 1966) but declined to follow that decision (R. 45; App., *infra,* p. 8a). Rather, the District Court noted a general nationwide atmosphere of dissent and dispute over the Vietnam war and held in view of that atmosphere, that the respondents' prohibition was not unreasonable (R. 43, 44; App., *infra,* pp. 6a, 7a).

On appeal to the United States Court of Appeals for the Eighth Circuit, the case was argued twice: once before a three-judge panel and subsequently before the court *en banc*. The decision of the District Court was affirmed by an evenly divided court with no discussion in the opinion of the substantive issues in the case.

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals, in affirming the District Court, has rendered a decision in conflict with another Court of Appeals on an important question of federal law which has not been but which should be settled by this Court.

In *Burnside* v. *Byars*, 363 F. 2d 744 (1966), the Court of Appeals for the Fifth Circuit held that public school officials had violated the First Amendment by suspending students for wearing small "freedom buttons" symbolic of their opinions that citizens have a right to vote and to have their votes count equally. As in the instant case, the conduct had been prohibited by school authorities ostensibly to maintain discipline although no actual disruption, or threat of it, had been shown. Furthermore, in both cases school authorities testified that the suspensions were for violating a regulation, not for causing disruption [363 F. 2d at 748; R. 34]. Though the District Court below believed *Burnside* to be factually the same as the case at bar, it reached an opposite conclusion because decisions of the Fifth Circuit "are not binding upon this Court" (R. 45; App., *infra*, p. 8a).

The central conflict between the decisions in the Fifth and Eighth Circuits turns on the extent to which school officials may suppress otherwise constitutionally protected expression. The Fifth Circuit has held that there must be a material and substantial interference "with the requirements of appropriate discipline in the operation of the school." 363 F. 2d at 749. The decision below, however, held that the mere apprehension of "reactions and comments from other students . . . [which] would be likely to disturb the disciplined atmosphere . . ." (R. 44; App., *infra*, p. 7a), is sufficient to permit suppression of speech. Cf. *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

These two views reflect conflicting models of the school community. On the one hand the school is thought of as a model of a democratic community, designed to instill the value of procedural due process, the rights of free speech and free expression which are to be encouraged in the adult democratic society. See, e.g., *West Virginia* v. *Barnette*, 319 U. S. 624 (1943); *Burnside* v. *Byars*, *supra*; *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150 (5th Cir. 1961); *Dickey* v. *Alabama State Board of Education*, 273 F. Supp. 613 (D. M. D. Ala. 1967); *Estaban* v. *Central Missouri State College*, D. W. D. Mo., No. 16473-4, October 3, 1967.

On the other hand, the school has been considered to be patterned after the parent-child relationship, with the teacher posed as the figure of authority presiding over the as yet unequal children. This model stresses the importance of the teacher—or the administrators—being best able to judge unilaterally what may possibly disrupt the educational process. The decision below follows this model in adopting respondents' contentions (R. 34, 35, 36, 38, 39)

that public schools have unqualified authority to prohibit political expression in school whether or not disruptive.

The decision below, insofar as it holds that constitutional restraints upon governmental interference with First Amendment rights or other provisions of the Bill of Rights, do not apply to public schools, is also directly in conflict with applicable decisions of this Court. Thus, this Court has held that the power to compel education of children does not sanction invasion of their religious freedom. *West Virginia* v. *Barnette, supra; School District* v. *Schempp,* 374 U. S. 203 (1963); *Engel* v. *Vitale,* 370 U. S. 421 (1962). As this Court has said, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault,* 387 U. S. 1 (1967).

Clearly, whatever rule is finally evolved must take into consideration the necessity for discipline and decorum in the schools. Some forms of expression which would be protected if conducted in public streets, would of course disrupt schools and the education process. But it does not follow that school officials may exercise a totally free hand in banning all speech—including, as here, a form of expression which causes no interference at all with the education process.[1]

Protection of the affirmative values involved in this case is another compelling reason for granting certiorari. The right to free speech embodied in the First Amendment is a lifeless right unless encouraged during school years. If citizens are instructed from kindergarten through high school that their political expression may be curtailed at

[1] This case also involves discriminatory enforcement of the First Amendment, for some kinds of political symbols had been allowed including Presidential campaign buttons and Iron Crosses associated with the Third Reich. See R. 34, 39-40.

the whim of school officers, and indeed may be forbidden entirely for the sake of preserving discipline, society will be the loser, for views of that sort are not easily abandoned when drummed into childrens' heads during their most formative years.

As far as this case is concerned it has so far taught Des Moines school children that speech is free only so long as it satisfies the government's choice as to time and place. The more fitting lesson yet to be learned—the lesson of the First Amendment—is that speech is free except when it presents a clear and present danger of a substantial evil which the state has a right to prevent.[2]

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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January 17, 1968

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[2] The District Court below relied upon *Dennis* v. *United States*, 183 F. 2d 201 (2nd Cir. 1950), aff'd 341 U. S. 494 (1951). It made no reference, however, to the subsequent holding in *Yates* v. *United States*, 354 U. S. 298 (1957), which seems effectively to have repudiated *Dennis*.

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 18,642

TINKER, *et al.*,

Appellants,

—v.—

THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, *et al.*,

Appellees.

Before VOGEL, Chief Judge; VAN OOSTERHOUT, MATTHES, BLACKMUN, MEHAFFY, GIBSON, LAY and HEANEY, Circuit Judges, sitting en banc.

Per Curiam.

This is an appeal from a judgment entered September 1, 1967, by the United States District Court for the Southern District of Iowa, Central Division, dismissing plaintiffs' complaint, based upon 42 U.S.C.A. § 1983, seeking an injunction and nominal damages against defendants, the Des Moines Independent Community School District, the individual members of its Board of Directors, its superintendent and various principals and teachers thereof, for sus-